Supreme Court, U.S.
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No. 02-1190

In The

Supreme Court of the United States

PAUL COLE,

Petitioner,

v.

BUILDERS SQUARE, INC. AND CUPRUM, S.A. DE C.V.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. May Petitioner assert before this Court an issue that he not only failed to present to the Court of Appeals but that affirmatively contradicts what Petitioner told the Court of Appeals was the applicable law?

2. Are the Oregon summary judgment standard and the federal summary judgment standard the same, thus rendering "choice of law" a moot question?

3. Should the Court refuse to grant a writ of certiorari in accordance with the guidelines stated in Supreme Court Rule 10 where Petitioner has admitted in his Petition for Rehearing to the Ninth Circuit that the alleged error "came in applying the law to the facts"?

4. Was Petitioner's proof too weak to withstand summary judgment on the question of punitive damages even under the standard that Petitioner now (and erroneously) contends is applicable?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Paul Cole, an individual. Respondent is Cuprum S.A., de C.V. ("Cuprum"), a Mexican corporation. Pursuant to Supreme Court Rule 29.6, Cuprum states that it has no parent corporation and that no publicly held corporation owns 10% or more of Cuprum's stock. (Petitioner erroneously listed Builders Square, Inc., in the caption of his Petition. Builders Square is no longer a party to this proceeding.)

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OPINIONS BELOW

The Ninth Circuit's unreported Memorandum Decision is found at page 1a of the Petitioner's Appendix ("Pet. App.") and at 48 Fed. Appx. 684 (9th Cir. 2002). The unreported rulings of the United States District Court for the District of Oregon are found in Pet. App. at pages 6a and 29a. The unreported order of the Ninth Circuit denying rehearing is found in Pet. App. at page 31a.

JURISDICTION

The Ninth Circuit entered its decision on October 11, 2002. Petitioner's timely Petition for Rehearing was denied by order filed November 14, 2002. Petitioner filed a timely Petition for Writ of Certiorari on February 11, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This diversity case involves the grant of summary judgment on Petitioner's claim for punitive damages under Oregon law. Punitive damages under Oregon law are governed by O.R.S. § 18.537(1) and O.R.S. § 30.925. O.R.S. § 18.537(1) provides as follows:

> **Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence** that the party against whom punitive damages are sought has acted with malice or has shown **a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a**

conscious indifference to the health, safety and welfare of others.

(emphasis added).

O.R.S. § 30.925 provides as follows:

(1) In a product liability civil action, punitive damages shall not be recoverable except as provided in ORS 18.537.

(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) **The degree of the defendant's awareness of that likelihood;**

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

(emphasis added).

STATEMENT OF THE CASE

Petitioner Paul Cole sued in Oregon state court for injuries received when he fell from a ladder manufactured by Cuprum. After the case was removed to federal court on the basis of diversity of citizenship under 28 U.S.C. §§ 1332 and 1441, the district court, adopting the findings and recommendations of the magistrate judge, granted summary judgment for Cuprum on the issue of punitive damages.[1] The case subsequently went to trial on Petitioner's two theories of strict liability: design defect and failure to warn. At the close of Petitioner's case, the district court granted judgment as a matter of law for Cuprum. On appeal, the Ninth Circuit reversed the judgment for Cuprum on the two strict liability claims and remanded for a new trial.[2] That ruling is not at issue here.

As to the grant of summary judgment for Cuprum on punitive damages, however, the Court of Appeals affirmed.[3] That is the ruling on which Petitioner seeks a writ of certiorari. Although Petitioner told the Ninth Circuit in his Opening Brief that the federal standard embodied in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), applied to the summary judgment ruling,[4] and although Petitioner told the Ninth Circuit in his Reply Brief that the issue was whether a jury could find by clear and convincing evidence that the standard for punitive

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[1] CR 79 (Pet. App. at p. 29a) and CR 69 (Pet. App. at p. 6a).

[2] Pet. App. at p. 1a.

[3] Pet. App. p. 1a.

[4] Respondent's Appendix ("Resp. App.") at pp. 3-4.

damages had been met,[5] Petitioner now tells this Court that the Ninth Circuit erred by applying the federal summary judgment standard and requiring a showing of liability for punitive damages by clear and convincing evidence.

According to Petitioner, this is the case in which to decide whether a federal court sitting in diversity should apply the state or federal standard for summary judgment. This is not that case. Not only has Petitioner taken the opposite position below as to the applicability of the federal standard, but on rehearing Petitioner expressly told the Ninth Circuit that there was *no difference* between the federal and Oregon standards for summary judgment[6] (which is true). Moreover, Petitioner also told the Ninth Circuit on rehearing that the "error" of which he complained consisted in the application of the law to the facts[7] – surely not a "cert. worthy" issue for this Court.

Finally, the Petition for a Writ of Certiorari should be denied because Petitioner's only evidence on the issue of punitive damages (the existence of three prior lawsuits against Cuprum involving the same model ladder, two of which resulted in defense verdicts and the third of which was settled prior to trial) was so weak that summary judgment was warranted no matter what evidentiary standard was applied.

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[5] Resp. App. at p. 8.

[6] Resp. App. at p. 14.

[7] Resp. App. at p. 12.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED WHERE PETITIONER NOT ONLY FAILED TO RAISE THE ISSUE BELOW BUT IN FACT TOOK THE DIAMETRICALLY OPPOSITE POSITION BELOW

Supreme Court Rule 15(2) requires a Respondent to call to the Court's attention no later than the Brief in Opposition "[a]ny [non-jurisdictional] objection to consideration of a question presented based on what occurred in the proceedings below." Cuprum points out that such objections do exist here. It is a fundamental precept of appellate law that "issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. [T]his principle . . . requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000). Thus, " '[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.' " *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998), quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Indeed, even where an issue is raised below it is considered untimely and consideration by this Court is "preclude[d]" if the matter is not raised until briefing on a petition for rehearing. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). Moreover, it is generally recognized "under the 'invited error' doctrine 'that a party may not complain on appeal of errors that he himself invited or provoked the [ ] court . . . to commit.' " *United States v. Wells*, 519 U.S. 482, 488 (1997), quoting *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993).

The instant Petition violates all of these principles and then some. Not only did Petitioner fail to argue below that a court sitting in diversity must apply the relevant state law summary judgment standard, but he told the Court of Appeals precisely the opposite. In his Opening Brief to the Ninth Circuit, Petitioner affirmatively represented to that Court that the standard for summary judgment was defined by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and two other federal cases that applied the federal summary judgment standard. *See* Resp. App. at pp. 3-4. Now, however, Petitioner continually vilifies *Anderson v. Liberty Lobby* and tells this Court that *Anderson* "is clearly inapposite here." Petition at p. 15.

Similarly, Petitioner told the Court of Appeals in his Reply Brief that "[a]t the summary judgment stage, the court's obligation is simply to examine the facts in a light most favorable to Cole and determine whether a jury *could* find the evidence clear and convincing." Resp. App. at p. 8 (emphasis in the original). It is undisputed that O.R.S. § 18.537(1) provides that "[p]unitive damages are not recoverable in a civil action unless" the requisite mental state of the defendant "is proven by clear and convincing evidence."

To this Court, Petitioner tells a much different story. Now, Petitioner claims that "The Magistrate Erroneously Applied A 'Clear And Convincing' Standard Instead Of Oregon's 'Any Evidence' Standard." Petition at p. 4. That assertion is especially disingenuous given the fact that the case Petitioner relied upon in his Reply Brief below was an

Oregon case,[8] *Onita Pacific Corp. v. Trustees of Bronson*, 858 P.2d 453, 456 (Or. Ct. App. 1993), *that applied the clear and convincing standard. See* Resp. App. at p. 8. Notably, Petitioner fails to cite that Oregon case in his Petition to this Court.

And even after Petitioner lost at the Ninth Circuit and that Court affirmed the grant of summary judgment for Cuprum on the claim for punitive damages, Petitioner did not raise in his Petition for Rehearing the issue that the Court should have applied the Oregon rather than the federal summary judgment standard. In affirming the summary judgment, the Ninth Circuit ruled that "[f]ederal law applies to the 'question of the quantum of proof necessary to sustain a cause of action.'" Pet. App. at pp. 3a-4a, citing *Safeway Stores v. Fannan*, 308 F.2d 94, 97 (9th Cir. 1962). In requesting rehearing, Petitioner did not challenge that ruling or contend that the Oregon summary judgment should have applied. To the contrary, Petitioner affirmatively represented to the Ninth Circuit that "Oregon's summary judgment standard is not unlike the federal standard," citing *Taylor v. Baker*, 566 P.2d 884, 886 n.2 (Or. 1977). *See* Resp. App. at p. 14. Not surprisingly, the *Taylor* case is another decision that Petitioner has elected not to bring to this Court's attention.

The issue that Petitioner raised on rehearing at the Court of Appeals was whether evidence of three prior lawsuits against Cuprum involving the same model ladder

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[8] And the citation of that Oregon case also shows that the issue Petitioner seeks to raise here is moot because the Oregon and federal summary judgment standards are in fact the same. *See* Section II, *infra*.

was sufficient to have given Cuprum "notice" for purposes of a claim for punitive damages. (In other words, would such lawsuits have made Cuprum "aware" of the "likelihood" of "serious harm" within the meaning of Oregon's punitive damages statute, O.R.S. § 30.925.) Nowhere in his Petition for Rehearing did Petitioner even mention the "clear and convincing" evidentiary standard much less claim that such standard was not to be considered in ruling on a summary judgment motion under Oregon law. Yet this is the thesis that forms the lynchpin of Petitioner's argument to this Court.

Having told the Ninth Circuit that (1) the federal summary judgment standard was applicable, and (2) the district court's obligation on summary judgment was to determine whether a jury could find liability for punitive damages by clear and convincing evidence, and (3) the Oregon and federal summary judgment standards were the same, Petitioner cannot now ask this Court to reverse the Court of Appeals for having embraced the very standard that Petitioner said was appropriate.

II. PETITIONER RAISES A "FALSE CONFLICT," FOR FEDERAL AND OREGON SUMMARY JUDGMENT STANDARDS ARE THE SAME

There is no dispute that Oregon substantive law applied to this products liability case that was removed from Oregon state court to federal court on the basis of diversity of citizenship. What Petitioner asks this Court to do is rule that the summary judgment standard represents substantive law and thus a district court sitting in diversity must follow the state and not the federal standard under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Ninth Circuit takes the position that federal law governs

the question of the sufficiency of the evidence in diversity cases. *See Safeway, supra, following Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 533-40 (1958); *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345 & n.3 (9th Cir. 1978) (noting that this approach "accords with the view taken by the commentators").

This Court has declined to reach this question on at least two occasions in the analogous context of the sufficiency of the evidence to support a jury verdict. *See Mercer v. Theriot*, 377 U.S. 152, 156 (1964); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959). In *Dick*, the Court recognized that "[l]urking in this case is the question of whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." 359 U.S. at 444-45. The Court declined to reach that issue because, *inter alia*, "the two standards [North Dakota and federal] are substantially the same." *Id.* at 445 (footnote omitted). That is also true here with respect to the federal and Oregon summary judgment standards.

Thus, Petitioner raises at most a "false conflict" in asking this Court to decide whether federal or Oregon law should control the disposition of Cuprum's motion for summary judgment on punitive damages. "'A 'false conflict' exists when the potentially applicable laws do not differ.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 839 n.22 (1985), quoting E. Scoles & P. Hay, CONFLICT OF LAWS § 2.6, p. 17 (1982). *Cf. Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Cir. 1994) (refusing to decide which state's law applied in diversity action because there was no "true conflict" as the laws of California and Illinois were "virtually identical" on the issue involved).

As Petitioner told the Ninth Circuit in requesting rehearing, "Oregon's summary judgment standard is not unlike the federal standard." Resp. App. at p. 14 (footnote omitted). In support of that proposition, Petitioner relied below upon *Taylor v. Baker*, *supra*, a 1977 decision in which the Oregon Supreme Court discussed the fact that Oregon's summary judgment standard[9] was patterned after Rule 56 of the Federal Rules of Civil Procedure (with the exception of the omission of subsection (d) of Rule 56 from the Oregon standard). 566 P.2d at 142 n.2. More recently, the Oregon Supreme Court reaffirmed the rule of *Taylor v. Baker* as to the similarity of the federal and Oregon summary judgment standards. *See Jones v. General Motors Corp.*, 939 P.2d 608, 616 (Or. 1997).

The Oregon and federal standards for the disposition of motions for summary judgment are in fact the same. Petitioner's new theory, that Oregon merely requires the production of "any evidence" to withstand a motion for summary judgment, even when the motion concerns punitive damages, which Oregon law requires to be proven by "clear and convincing" evidence, finds no support in Oregon law. Petitioner claims that *Jones* holds that the summary judgment standard is "any evidence." Petition at p. 5 n.14. This is not true. What the Oregon Supreme Court actually said in *Jones* was that "sufficient evidence" was required:

> "In deciding whether a genuine issue of fact exists, courts generally read 'genuine issue' to

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[9] That standard was then contained in O.R.S. § 18.105 (repealed 1979). The standard is now set forth in Rule 47 of the Oregon Rules of Civil Procedure.

> mean 'triable issue.' Before a party has a triable issue, **he or she must have *sufficient evidence* to be entitled to a jury determination**. This has led both courts and commentators to compare the motion for summary judgment to the motion for a directed verdict. **10 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2713."**

(emphasis added), quoting *Seeborg v. General Motors Corp.*, 588 P.2d 1100, 1103 (Or. 1978).

The fact that the Oregon Supreme Court relied upon the Wright & Miller treatise FEDERAL PRACTICE AND PROCEDURE in describing the summary judgment standard should put to rest Petitioner's notion that the Oregon and federal summary judgment standards differ. They do not.

In Oregon, just as under Federal Rule 56, in ruling on a motion for summary judgment on an issue for which the evidentiary standard is "clear and convincing," such as punitive damages, the trial court must determine whether a reasonable jury could find the elements of the claim by clear and convincing evidence. That is precisely what the Oregon Court of Appeals held in *Onita Pacific Corp.*, 858 P.2d at 456, relied upon by Petitioner below, with respect to the analogous situation of a directed verdict on a fraud claim (which similarly requires proof by "clear and convincing" evidence under Oregon law). As the *Onita Pacific* Court held:

> It is not our job to decide whether the evidence is clear and convincing, **but to decide whether a jury could find that it is.**

Id. (emphasis added). That is what the magistrate judge did below. Indeed, the magistrate judge quoted the same

language from *Onita Pacific* set forth above that Petitioner later quoted to the Ninth Circuit in his Reply Brief. *Compare* Pet. App. at p. 27a *with* Resp. App. at p. 8. Federal law is the same. *See Anderson v. Liberty Lobby*, 477 U.S. at 254 (the federal standard requires the court to "view the evidence presented through the prism of the substantive evidentiary burden").

Petitioner's theory that the federal and Oregon standards differ is based on *Bolt v. Influence, Inc.*, 43 P.3d 425 (Or. 2002), a case involving the standard for amending a complaint to add a claim for punitive damages. The statute setting forth the standard to amend a complaint to add a claim for punitive damages is O.R.S. § 18.535(3); the statute proving that punitive damages may not be recovered unless the plaintiff establishes the mental state of the defendant by clear and convincing evidence is O.R.S. § 18.537(1). The *Bolt* Court explained that "**[t]hose statutes** [O.R.S. § 18.535(3) and O.R.S. § 18.537(1)] do not refer to each other and, in our view, they **are directed at unrelated issues**; the burden of proof required to *amend a complaint* to plead punitive damages and, in contrast, the burden of proof required to *recover* punitive damages at trial." 43 P.3d at 428 (italics in the original; boldface added). Nothing in *Bolt* supports Petitioner's thesis that an Oregon court would refuse to take into account the clear and convincing evidentiary standard when ruling on a motion for summary judgment on punitive damages. Because the federal and Oregon summary judgment standards are the same, Petitioner presents at best a "false conflict" that does not merit consideration by this Court.

III. THE PETITION INVOLVES ONLY THE APPLICATION OF LAW TO FACT, WHICH IS NOT A PROPER SUBJECT FOR CERTIORARI

Supreme Court Rule 10 provides that "[a] *petition* for a writ of certiorari *is rarely granted when the asserted error consists of* erroneous factual findings or *the misapplication of a properly stated rule of law.*" (emphasis added). Yet, in petitioning the Ninth Circuit for rehearing, Petitioner specifically described the ruling below that the Court of Appeals had allegedly erred in affirming as involving *the misapplication of law to facts*:

> *The Magistrate who heard the motion made a number of appropriate preliminary observations and rulings.* She acknowledged that for purposes of summary judgment she would accept as true the opinions of Cole's three experts that Cuprum's rung lock design was defective and posed a danger to users; she properly assigned no weight to Cuprum's contrary evidence; and she properly framed the issue under Oregon law as turning on whether Cuprum had prior notice of "problems with the Model 534 rung locks." *Her error, however, came in applying the law to the facts.* She ignored Cole's unrefuted evidence that the prior claims and suits put Cuprum on notice that its ladder posed a danger to consumers.

Resp. App. at pp. 11-12 (emphasis added).

Under this Court's Rule 10, Petitioner's lament that the magistrate misapplied the law to the facts does not present an issue that merits attention. Moreover, the fact that Petitioner told the Ninth Circuit on rehearing that the error "came in applying the law to the facts" is further evidence that Petitioner did not complain below that the summary judgment motion had been decided under an

erroneous evidentiary standard, as he now tells this Court. It is far too late to assert such a theory in a Petition for a Writ of Certiorari.

IV. PETITIONER COULD NOT SATISFY THE OREGON CRITERIA FOR PUNITIVE DAMAGES UNDER ANY EVIDENTIARY STANDARD

This Court did not need to decide whether the state or federal standard was applicable to determine the sufficiency of the evidence to support the jury verdict in another diversity action, *Mercer,* because "[t]he evidence was sufficient under any standard which might be appropriate – state or federal." 377 U.S. at 156. The same holds true here. Whether Cuprum's motion for summary judgment on punitive damages is judged under the "clear and convincing" evidentiary standard (which is required under either federal or Oregon law) or the lesser "any" evidentiary standard that Petitioner now (and erroneously) claims is applicable, the result is the same. Petitioner failed to adduce evidence from which a reasonable jury could have concluded that Petitioner met Oregon's stringent standards for an award of punitive damages.

As shown in the passage of the Petition for Rehearing quoted in Section III, *supra*, the critical issue below was whether Cuprum had *prior notice* of alleged problems with the rung locks on the Model 354 ladder, as required by Oregon law. *See* O.R.S § 30.925(2)(b) (one criterion for punitive damages is the degree of the defendant's "awareness" of the likelihood of serious harm); O.R.S. § 18.537(1) (in order for punitive damages to be recoverable, a defendant must know, or reasonably should know, that its product creates a "highly unreasonable risk of harm" to

others). *See also Andor v. United Air Lines, Inc.*, 739 P.2d 18, 25 (Or. 1987) ("[p]unitive damages . . . are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard or indifference to *known or highly probable risks to others*") (emphasis added).

The only evidence Plaintiff presented of Cuprum's "notice" of the alleged defect, however, consisted of *three* lawsuits involving the same model ladder – *three* lawsuits, despite the fact that Cuprum established that it had manufactured over *10,000* Model 534 ladders between 1989 and 1998. Pet. App. at p. 24a. The magistrate found all three lawsuits were admissible to prove the punitive damages claim. Pet. App. at pp. 18a-23a. Yet the magistrate concluded that evidence of these three lawsuits was insufficient to prove that Cuprum had the requisite notice concerning the allegedly defective nature of the design of its ladder rung locks.

This conclusion was warranted under any evidentiary standard. What Petitioner tries to ignore (after having candidly admitted it in his Opening Brief to the Ninth Circuit) is the fact that *two of those three lawsuits resulted in defense verdicts for Cuprum*. Resp. App. at p. 3. Thus, the only "notice" that those lawsuits afforded Cuprum was notice that its ladder design was *not* defective. And the third lawsuit on which Petitioner relied was *settled* prior to trial. Resp. App. at p. 3. Such a suit was similarly insufficient to give Cuprum the "notice" required by O.R.S §§ 30.925(2)(b) and 18.537(1) and decisions such as *Andor v. United Air Lines*. This is simply not a case such as *Oberg v. Honda Motor Co.*, 888 P.2d 8, 13-14 (Or. 1995), relied upon by Petitioner, in which punitive damages were warranted because a defendant continued to sell its three-wheeled motorcycles for 14 years despite having actual,

not assumed, knowledge of a design defect based upon a federal government investigation into the safety of the product. There was no such notice here.

Evidence of two defense verdicts and one settled complaint could not give Cuprum the requisite notice under Oregon law regardless of what evidentiary standard was applied. Cuprum was therefore entitled to summary judgment on Petitioner's claim for punitive damages.

CONCLUSION

Cuprum respectfully submits that the Petition for a Writ of Certiorari should be denied. Petitioner's failure to preserve any issue for review, his affirmative representations below contradicting the positions espoused before this Court, and the absence of any merit to the substance of Petitioner's claim for punitive damages all counsel that the Court should refuse to grant the Petition.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V.,

Defendant-Appellee

OPENING BRIEF OF PLAINTIFF-APPELLANT PAUL COLE

Appeal from the Judgment of the United States District Court for the District of Oregon
Civil No. CV99 00729 PA
Honorable Owen M. Panner,
United States District Court Judge

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* * *

[Page 7] At the close of Cole's case in chief, the trial court directed a verdict against him. It held that Cole failed to establish a jury issue as to whether Cuprum's ladder was

dangerously defective under the *consumer expectation* test, the test adopted by Oregon to establish product liability. It also held that because Cole failed to follow instructions, he was barred from recovering as a matter of law.

This appeal challenges the trial court's grant of a directed verdict along with a number of other rulings that were made and will arise on remand.

V. SUMMARY OF ARGUMENT

A. The trial court erred in relying on the Oregon Court of Appeals decision in *McCathern v. Toyota* in directing verdict against Cole for failing to prove an alternative safer design. The later Oregon Supreme Court decision in *McCathern*, made clear the Oregon Court of Appeals was wrong. Proof of an alternative safer design is not necessary to prove liability in a design case. If the product is dangerous beyond what is expected by a consumer, the manufacturer is liable. Nevertheless, Cole presented a number of design measures Cuprum could have utilized to eliminate the danger caused by its false locking rung lock.

The trial court also erred in directing verdict on Cuprum's affirmative defense that Cole failed to follow the ladder's instructions. The effect of the trial court's ruling was to improperly shift the burden of proving the defense from Cuprum to Cole. And by doing so, the trial court deprived Cole of the right to [Page 8] challenge the validity of the defense through cross examination and rebuttal evidence.

B. The Magistrate erred in granting summary judgment on Cole's punitive damage claim on the grounds that the three prior lawsuits against Cuprum alleging the

same design defect could not constitute notice because none of the suits resulted in plaintiff's verdicts. The ultimate resolution of a prior claim is not relevant to its admissibility to prove notice of a product defect. All that is necessary is that the claims are substantially similar. And here, all three met that standard.

C. At trial, Cole offered the three prior lawsuits to prove that Cuprum had prior notice of the problem with its rung lock. The trial judge made the same mistake as the Magistrate did by excluding two of the lawsuits on the grounds that they resulted in defense verdicts. The trial court also erred in the third lawsuit, which settled, on the basis that admitting the claim to prove notice would require trying the merits of the claim. But again, because the ultimate resolution of the claim is not relevant to its ability to impart notice, the merits of the claim are also not relevant, eliminating the fear of having to try the merits of the case.

D. The trial court erred in excluding Cole's expert testimony on the standard of care in the ladder industry on the basis that the jury was capable of making that determination without the aid of expert testimony. A jury cannot be

* * *

[Page 28] The Magistrate's conclusion is unsupportable.

2. Standard of review for summary judgment

The court must view the evidence presented in a motion for summary judgment in the light most favorable to the opposing party. "The evidence of the non-movant is

to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). "At the summary judgment stage, the non-movant's version of any disputed issue of fact is presumed correct." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076 (1992); *T.W. Elec Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-631 (9th Cir. 1987). In other words, Cole's facts are presumed true and are to be believed.

3. Punitive damage standard

If Cole establishes facts that – when viewed in a light most favorable to him – create an inference that Cuprum "has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others," he is entitled to have the jury hear his claim for punitive damages. ORS 18.537(1). Cole presented such facts.

* * *

[Page 28] striking Cole's punitive damage claim should be reversed, and the jury should be allowed hear the claim.

C. The Trial Court Erred in Excluding Evidence of Prior Similar Claims

1. Background

Cole sought to impose liability on Cuprum under two theories: 1) strict liability under Oregon's product liability statute; and, 2) common law negligence. Cole's negligence claim was based on Cuprum's continued sale of ladders

that it knew or should have known were dangerously defective; its failure to either retrofit or recall those ladders already in commerce; and its failure to issue a danger warning to ladder users.[86]

To prove that Cuprum was aware of the dangerous characteristics of its rung lock design long before Cole's injury, Cole introduced the three prior suits discussed above. But the trial court made the same error as the Magistrate did, ruling that two of the lawsuits, *Bazan* and *Watkins*, were not admissible on the issue of notice because they each resulted in defense verdicts.[87] The trial court held that the third lawsuit – *Jehnsen*, which settled – was inadmissible pursuant to FRE 403. In performing its FRE 403 analysis, the court accepted Cuprum's

* * *

[Page 49] benefits from a collateral source for injuries and expenses. Thus, the party who should benefit from insurance is the party who responsibly procures the insurance and pays its premiums, not a tortfeasor who causes personal injury.

On remand, the trial court's ruling limiting Coles recovery should be reversed and Cole should be entitled to recover the full $153,711 in medical bills.

VII. CONCLUSION

Giving Cole the benefit of every reasonable inference, whether Cuprum's rung lock posed an unexpected danger

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[86] Pretrial Order, ER10 at 116.

[87] ER13 at 130-32.

was a factual question that should have been determined by the jury. This court should reverse the trial court's judgment and remand for a new trial. On remand, this court should allow Cole to present his punitive damage claim to the jury. Finally, this court should remedy the trial court errors that will arise during remand.

Respectfully Submitted,

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Resp. App. 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V.,

Defendant-Appellee

REPLY BRIEF OF PLAINTIFF-APPELLANT PAUL COLE

Appeal from the Judgment of the United States District Court for the District of Oregon
Civil No. CV99 00729 PA
Honorable Owen M. Panner,
United States District Court Judge

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* * *

[Page 18] **II.**
SUMMARY JUDGMENT ON PUNITIVE DAMAGES

A. If an Issue of Fact Exists, Then Summary Judgment Is Inappropriate

Cuprum attempts to elevate Cole's burden to defeat its summary judgment motion by suggesting that this Court must weigh the evidence and determine whether it is clear and convincing. Respondent's Brief at 24. Cuprum is wrong. At the summary judgment stage, the court's obligation is simply to examine the facts in a light most favorable to Cole and determine whether a jury *could* find the evidence clear and convincing, not whether it is:

> "It is not our job to decide whether the evidence is clear and convincing, but to decide whether a jury could find that it is." *Onita Pacific Corp. v. Trustees of Bronson*, 122 Or. App. 452, 457, 858 P.2d 453 (1993).

B. The Magistrate's Grant of Summary Judgment Was Based on the Premise That No Juror Cuold Find That Cuprurm Knew or Should Have Known of the Ladder's Dangerous Propensities

Cuprum next attempts to hide the basis of the Magistrate's ruling by carefully quoting around the ruling's pivotal language. Nowhere does Cuprum mention that at the heart of the Magistrate's ruling was the finding that no reasonable jury could find that Cuprum knew or should have known of the dangerous propensities of its ladder:

* * *

[Page 32] Brief at 48.) In fact, Cuprum fails to cite any authority, which is ironic, as it is Cuprum that accuses Cole of failing to provide any Oregon authority.

VI.
CONCLUSION

Based upon the foregoing, this Court should reverse the judgment entered against Cole and remand to the trial court for a new trial.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V.,

Defendant-Appellee

PETITION FOR REHEARING

Appeal from the Judgment of the United States District Court for the District of Oregon

Honorable Owen M. Panner,
United States District Court Judge

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[Page 2] 1995.[2] All three resulted in lawsuits naming Cuprum as a defendant. *Watkins* was filed in 1992[3], *Bazan* in 1994[4] and *Jensen* in 1996.[5] And each alleged the same design defect that is at issue in the instant case caused serious injury.

Even in the brunt of these claims, Cuprum failed to take any action to correct its design or to warn consumers of the danger. Instead it continued to manufacture and sell ladders it knew to be defective. Eventually, in 1998, Cole was seriously injured.

Cole sought punitive damages to deter Cuprum and others similarly situated from ignoring such hazards. Cuprum moved for a summary judgment of dismissal against Cole's punitive damage claim.[6]

The Magistrate who heard the motion made a number of appropriate [Page 3] preliminary observations and rulings.[7] She acknowledged that for purposes of summary judgment she would accept as true the opinions of Cole's three experts that Cuprum's rung lock design was defective

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[2] ER6 at 65-66.

[3] *Watkins v. Cuprum International, Inc. and Alamo Iron Works, Inc.*, Brazos County District Court Cause No. 36.987-85 (Texas 1992).

[4] *Domingo Bazan v. Cuprum, S.A. DE C.V., Davidson Ladders, Inc. and Builder's Square, Inc.*, Harris County District Court Cause No. 96-32221 (Texas 1994).

[5] *Jehnsen v. Builder's Square, Inc., Davidson Ladders, Inc. and Cuprum, S.A. DE C.V.*, Bay County Circuit Court Case No. 96-3148-NP-B (Michigan 1996).

[6] ER3 at 5.

[7] The district court adopted the reasoning of the Magistrate with little discussion. ER11 at 121.

and posed a danger to users; she properly assigned no weight to Cuprum's contrary evidence;[8] and she properly framed the issue under Oregon law as turning on whether Cuprum had prior notice of "problems with the Model 534 rung locks."[9] Her error, however, came in applying the law to the facts. She ignored Cole's unrefuted evidence that the prior claims and suits put Cuprum on notice that its ladder posed a danger to consumers. Specifically she ruled:

> "Here, no reasonable jury could find that Cuprum has had notice, or should have had notice, of any defect in the rung lock mechanism of the Model 534 extension ladder."[10]

ARGUMENT

The Magistrate's ruling lacks rationale or legal support. There is not a single state or federal case that supports the assertion that a lawsuit claim alleging [Page 4] a dangerous condition, let alone three, does not operate to impart notice to the named party of the danger alleged. Moreover, by ignoring what Oregon considers valid notice of a danger, the holding improperly intrudes upon Oregon's right to set safety standards to protect her citizens.

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[8] ER9 at 101.

[9] ER9 at 104.

[10] ER9 at 113.

A. The Magistrate's Ruling Has No Support in Under Either Federal or State Law

Under Oregon law, complaints in the form of lawsuits alleging a dangerous condition or design unquestionably places the named defendant on notice of the danger.[11] A jury is not only entitled to hear such evidence, it is authorized to award punitive damages when the defendant fails to act:

> "At trial, plaintiff presented evidence that permitted a jury to conclude, by clear and convincing evidence, that defendants acted with wanton disregard for the health and safety of others.
>
> * * *
>
> "Evidence was presented that defendants actually knew, or should have known, for many years before developing the ATV model that injured plaintiff, that their ATVs were highly likely to cause serious personal injury or death." *Oberg v. Honda Motor Co.*, 320 Or. 544, [Page 5] 553, 888 P.2d 8 (1995).

Although this panel issued an unpublished opinion, by affirming the Magistrate's opinion, this panel gave its stamp of approval to the Magistrate's erroneous holding. This panel's rationale for doing so – that the Magistrate was entitled to apply the federal standard rather then [sic]

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[11] *See, e.g. Oberg v. Honda Motor Co.*, 320 Or. 544, 553, 888 P.2d 8 (1995); *Waddill v Anchor Hocking, Inc.*, 149 Or. App. 464, 468, 944 P.2d 957 (1997); *Lakin v. Senco Products*, 144 Or. App. 52, 61, 62-63, 925 P.2d 107 (1996), *aff'd.*, 329 Or. 62, 987 P.2d 463, (court adopted reasons of lower court for affirming admission of prior acts. *Id.* at 84) *mod. on recons. on unrelated grounds*, 329 Or. 369, 987 P.2d 476 (1999).

the Oregon standard to the quantum of evidence necessary to overcome the moving party's summary judgment motion[12] – cannot justify the error.

First, Oregon's summary judgment standard is not unlike the federal standard.[13] But even if it were not, there is no federal case that supports the novel proposition service of a lawsuit alleging a dangerous condition or design does not operate to impart notice to the named defendant.

Second, contrary to the Magistrate's holding, there is simply no precedent in *any* jurisdiction anywhere – state *or* federal – requiring that notice of a

* * *

[Page 9] **CONCLUSION**

This Court should amend its Memorandum Opinion and reverse its ruling that Plaintiff failed to present the sufficient quantum of evidence to establish a jury issue on punitive damages. In the alternative, this Court should certify to the Oregon Supreme Court the question as to

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[12] Add-4.

[13] "Oregon's summary judgment statute, ORS 18.105 (Oregon Laws, 1975, ch 106, § 1), is patterned after Rule 56 of the Federal Rules of Civil Procedure. However, subsection (d) of Rule 56 was not adopted by the legislature. * * * Therefore, federal cases interpreting those aspects of Rule 56, other than subsection (d) thereof, and decided prior to the enactment of this state's summary judgment statute, are entitled to great weight." *Taylor v. Baker*, 279 Or. 139, 141 n. 2, 566 P.2d 884 (1977).

whether *Oberg*'s "knew or should of known" standard still applies under the amended statute.

Dated this 30th day of October, 2002.

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